IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

OCTOBER TERM, 1897.

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No. 143.

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WILLIAM W. CONDE and JOHN C. STREETER,
PLAINTIFFS IN ERROR,

*against*

ANSON E. YORK and WALLACE W. STARKWEATHER, DEFENDANTS IN ERROR.

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## BRIEF FOR PLAINTIFFS IN ERROR.

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WATERTOWN, N. Y.:
O. E. HUNGERFORD, ARCADE STREET.
1897.

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WILLIAM W. CONDE AND JOHN C. STREETER, PLAINTIFFS IN ERROR,

vs.

ANSON E. YORK AND WALLACE W. STARKWEATHER, DEFENDANTS IN ERROR.

**Brief for Plaintiffs in Error.**

### STATEMENT.

This case is brought into the Supreme Court on a writ of error for the purpose of reviewing a judgment of the New York Supreme Court, entered in Jefferson County for $2921.25 damages, and $449.39 costs, amounting in all to $3,370.64, which judgment was in favor of the defendants, in error, and against the plaintiffs, in error. This judgment was reviewed on appeal by the Court of Appeals, where it was affirmed, (147 N. Y., 486) and the opinion of the Court of Appeals is contained in the record.

The facts in this case are undisputed, and are as follows:

In September, 1889, the firm of Witherby & Gaffney, contractors and builders, entered into a contract with the Government of the United States to construct certain buildings, known as Officers' Quarters, at Madison Barracks, Sackets Harbor, N. Y. Thereafter, the plaintiffs in this action, at the request of Witherby & Gaffney, sold and delivered to them on credit, lumber and building material which were used in the construction of said buildings, and were of the value of more than $3,000. Being so indebted, Witherby & Gaffney, before the completion of the contract, and on March 27, 1890, executed an assignment to the plaintiffs, of $3,000 of the moneys which should thereafter become due and owing to them from the Government, to be applied in part payment of their said indebtedness.

The instrument of assignment is as follows:

"Whereas, we have a contract with the United "States Government for the construction of build-"ings and Officers' Quarters at Madison Barracks, "Sackets Harbor, Jefferson County, N. Y.

"And whereas, we are indebted to York & Stark-"weather, of Watertown, N. Y., in the sum of three "thousand dollars and more on account of ma-"terials furnished us by them, that were used in "said buildings and quarters.

"And whereas, there will be due and payable to "us on account of our work, etc., from the Govern-"ment considerable sums of money before and on "the completion of our said; work

"Now, therefore, of the moneys due and to be-
"come due us from the said Government, we do
"hereby, for value received, assign and transfer to
"said York & Starkweather, the sum of three
"thousand dollars, and do hereby authorize, em-
"power, request and direct Lieut J. E. Macklin, R.
"Q. M., Eleventh Infantry, U. S. A., through whom
"payments are made for such construction, to pay
"to said York & Starkweather, on our account for
"such construction, the full sum of three thousand
"dollars, as follows: First, $500 from the next es-
"timate and payment due or to become due us, and
"the sum of $2,500 on the completion of said work
"by us, and when the balance of our contract with
"the Government becomes due and payable to us.

"Dated March 27th, 1890.

[L. S.] WITHERBY & GAFFNEY.

"Signed, sealed and delivered in the presence of
Orrin J. Robinson,
(p. 8.) Ira Gardiner."

Leiut. Macklin was the quartermaster and disbursing agent of the United States Government at Sackets Harbor (p. 30). He refused to recognize the assignment and gave a draft on the Treasury, covering the moneys specified in the assignment, to Mr. Gaffney, one of the assignors, on May 15, 1890, and on the same day Gaffney turned the draft over to Conde for the benefit of Conde and his co-plaintiff in error, Streeter, (p. 23) and the money was applied by them, with the exception of $628, which was paid back to Gaffney, in discharge of liabilities incurred by Streeter and Conde as endorsers for Witherby & Gaffney, made to enable Witherby & Gaffney to raise money to complete the contract pp. 23,28). Conde was also a surety to the Government on the contractors' bond for the faith-

ful performance of the contract by Witherby & Gaffney (p. 24).

Two defenses were set up by Conde & Streeter, each answering separately. The second defense in the answers, and the only one to be considered on this appeal, alleged (pp. 12, 15) that the assignment by Witherby & Gaffney to York & Starkweather was of a claim against the United States Government, and that the same had not at the time of the assignment been allowed, or the amount due thereon ascertained. That no warrant had been issued for the payment thereof, and that it did not recite the warrant for payment issued by the Government, and was not acknowledged by the person making the same, before an officer having authority to take acknowledgements of deeds, and that the said assignment was in violation of the laws of the United States and of the State of New York, and particularly of Section 3,477 of the Revised Statute, U. S., and of sub-division 3 of Section 1,910, N. Y. Code Civil Procedure.

All the evidence and proceedings on the trial, so far as they relate to this defense are set forth pages 18 to 20 of the Transcript of Record. At the close of the plaintiffs' case (p. 20) each of the defendants moved separately, in his own behalf, for a non-suit, on the ground "that the plaintiff has "failed to make out a cause of action against him, "and on the ground that the original transfer or "assignment of this claim against the United "States Government was void upon its face, under

"Section 3,477, and other related sections of the "Rev. Stat., U. S." This motion was denied and each defendant excepted.

The other defense, to which most of the evidence taken on the trial relates, was that the defendants, Streeter and Conde, held an oral equitable assignment of the same moneys referred to in the assignment to York & Starkweather, which had been executed at a time prior to the date of the written assignment upon the occasion of the endorsement of the notes for the accommodation of Witherby & Gaffney. Upon this second issue, the defendants were beaten upon the trial, the verdict of the jury being against them.

The only question in the case is, whether Section 3,477 of the Revised Statutes of the United States prohibits and renders void the assignment from Witherby & Gaffney to York & Starkweather of an interest in the claim of Witherby & Gaffney against the United States for the construction of Officers' Quarters at Madison Barracks, Sackets Harbor, N. Y. That section reads as follows:

"All transfers and assignments made of any "claim upon the United States, or of any part or "share thereof, or interest therein, whether abso- "lute or conditional, and whatever may be the con- "sideration therefor, and all powers of attorney, "orders or other authorities for receiving payment "of any such claim, or of any part or share thereof, "shall be absolutely null and void, unless they are "freely made and executed in the presence of at

"least two attesting witnesses, after the allowance "of such a claim, the ascertainment of the amount "due, and the issuing of a warrant for the payment "thereof. Such transfers, assignments, and pow- "ers of attorney, must recite the warrant for pay- "ment, and must be acknowledged by the person "making them, before an officer having authority "to take acknowledgements of deeds, and shall be "certified by the officer; and it must appear by the "certificate that the officer, at the time of the ack- "nowledgement, read and fully explained the "transfer, assignment or warrant of attorney to "the person acknowledging the same."

As the assignment shows upon its face that it is not acknowledged, and does not recite the warrant for payment, and expressly declares that it was intended to reach moneys that are to become due and which have not yet been allowed, it is clear that it does not conform to the conditions of this section. If the assignment, therefore, is within the terms of this section, it is void. The courts below have held that Section 3,447 does not cover or apply to the assignment in question.

This statute is the successor of an act to Congress, approved February 26, 1853, entitled "An "Act to prevent frauds upon the Treasury of the "United States," and of an act of July 29, 1846, entitled, "An Act in relation to the payment of "claims." See Gould's & Tucker's notes on Rev. Stat., U. S., Section 3,447, and U. S. vs. Gillis, 95, U. S., 407.

Reverdy Johnson, when Attorney General, (1849), 5 Op. Atty. Gen. U. S., 85, writing in Satterlee Clark's claim, which was being prosecuted before Congress, held that it was not assignable before allowance under the provisions of the Act of July, 1846. He says:

"It provided that no claim thereafter allowed by "resolution or Act of Congress, and directed to be "paid shall, nor shall any part thereof be paid to "any person or persons other than the claimant or "his executor, or administrator, unless such person "or persons shall produce a warrant of attorney "executed after the passage of such resolution or "Act, expressly reciting the amount allowed, and "be attested by two witnesses, and acknowledged "by the party making it before an officer having "authority to take acknowledgement of deeds."

# POINTS.

## I.

**The purpose of this statute is to prohibit and render void every voluntary assignment or the transfer of a claim against the United States.**

U. S. v. Gillis, 95 U. S., 407.
Spofford v. Kirk, 97 U. S., 484
McKnight vs. U. S., 98 U. S., 197.
St. Paul & Duluth R. R. Co. v. U. S., 112 U. S., 733.
Hager v. Swayne, 149 U. S., 242.
Ely v. U. S., 19 Ct. Clms., 658, 664.
Johnston v. U. S., 13 Ct. Clms., 217, 224.
Belt v. U. S., 15 Ct. Clms., 92, 110.
Forehand v. U. S., 23 Ct. Clms., 477.

5 Op. Atty. Gen. U. S., 85.
16 Op. Atty. Gen. U. S., 261.
16 Op. Atty. Gen., 191.
Lopez v. U. S., 24 Ct. Clms., 84.
Howes v. U. S., 24 Ct. Clms., 170.
Harris v. U. S., 27 Ct. Clms., 177.
Becker v. Sweetzer, 15 Minn., 427.
Emmons, 42 U. S., Fed., Rep., 26.
Hitchcock v. U. S., 27 Ct. Clms., 185.
Trist v. Child, 21 Wall, 441, 447.
Newell v. West, 149 Mass., 520.
McKee v. Cochrane, 17 Washington Law Reporter, 219 (Supreme Court, District of Columbia, 1889).
Woods v. Dickinson, 18 Washington Law Reporter, 5 (District of Columbia, 1889).

In Hager vs. Swayne, 149 U. S., 242, it is decided that the assignment of a claim against the United States for an excess of duties paid on the importation of merchandise, is void. Chief Justice Fuller says in that case (p. 247):

"By Section 3,477, all transfers and assignments "made of any claim upon the United States, or of "any part or share thereof, or interest therein, "whether absolute or conditional, and whatever "might be the consideration therefor, and all pow- "ers of attorney, orders or other authorities for "receiving payment of any such claim, or of any "part or share thereof, were declared to be abso- "lutely null and void, unless they were freely made "and executed in the presence of at least two "attesting witnesses, after the allowance of such a "claim, the ascertainment of the amount due, and "the issuing of a warrant for the payment thereof. "The language is general which declares the nul- "lity of such assignments, and the only cases "where they are recognized is where a warrant has "already been issued. If there are any cases

"where the claim cannot be paid by warrant, then "they do not come within the exception, but are "affected by the general language. 16 Op. Atty. "Gen., 261.

"The mischiefs designed to be remedied by this "section were declared by Mr. Justice Miller in "Goodman vs. Niblack, 102 U. S., 556, to be mainly "two; first, the danger that the rights of the Gov- "ernment might be embarrassed by having to deal "with several persons instead of one, and by the "introduction of a party who was a stranger to the "original transaction; second, that by a transfer "of such claim against the Government to one or "more persons not originally interested in it, the "way might be conveniently opened to such im- "proper influences in prosecuting the claim before "the Departments, the Courts or the Congress, as "desperate cases, where the award is contingent "on success, so often suggest.

"It has been frequently held that the section "does not include transfers by operation of law, or "by will, in bankruptcy or insolvency. Butler vs. "Gorley, 146 U. S., 203, and cases cited. But the "legislation shows that the intent of Congress was "that the assignment of naked claims against the "Government for the purpose of suit, or in view of "litigation or otherwise, should not be counten- "anced. At common law, the transfer of a mere "right to recover in an action at law was forbidden "as violating the rule against maintenance and "champerty, and although the rigor of that rule "has been relaxed an assignment of a chose in ac- "tion will not be sanctioned when it is opposed to "any rule of law or public policy."

U. S. vs. Gillis, where this act was first construed by the Supreme Court arose upon the transfer of a claim against the Government for cotton seized during the war. The claim had been assigned to Gillis by the owner of the cotton, and he had pro-

secuted in the Court of Claims. Mr. Justice Strong, writing for the Court, held that the statute embraced all claims of every name and nature against the United States, and the claimant was defeated in his action on the ground that the statute prohibited the transfer or assingment, and made it void.

In McKnight vs. U. S., 98 U. S., 179, on an appeal from the Court of Claims, it appeared that the claim against the United States had been allowed by the proper officers and assigned, and a part thereof paid to the assignee, when the payment of the balance was refused on the ground of a liability from the claimant to the United States on an official bond in another matter. The assignee brought suit against the United States for the balance, and the Court, Mr. Justice Swayne, writing the opinion, decided that the assignment was wholly void, (the payment of a part of the claim to the assignee not estopping the United States from avoiding it as to the balance), and that payment of the balance could be successfully resisted by the Government.

In St. Paul & Duluth R. R. Co. vs. U. S., 112 U. S., 733, it was determined by the Supreme Court, Mr. Justice Matthews writing the opinion, that a voluntary transfer of a claim against the United States by way of mortgage, and the completion of that transfer by judicial sale under the mortgage, is within the provision of Section 3,477, and is void. The case is sometimes referred to under the

title of Flint & Pere Marquette R. R. Co vs. U. S., cited at the end of the opinion, (p. 737).

In Emmons vs. U. S., 42 Federal Reporter, 26, it was held that assignments of claims for the purchase price paid upon void entries upon public lands are void under Section 3,477. (Judge Hanford, Oregon Circuit, April, 1890).

**In the Court of Claims and the Attorney General's office this principle has been uniformly recognized.**

In Hitchcock vs. U. S., 27 Ct. Cls. 185 (1892), there was a contest between a bank, which had advanced money to aid a contractor in doing government work and taken as security an assignment of the final payment which was to be made to the contractor upon the completion of the contract, and the surety who had completed the contract, on failure of the contractor to do so. Held that although the bank was expressly authorized by the instrument "to receive our last estimate from the "United States on our contract for erection of United States Custom House at Galveston," that such provision was absolutely void under Section 3,477, and that the surety was entitled to recover the full amount due.

This case resembles the case at ~~the~~ bar. York & Starkweather were material men who had fur-

nished materials to Witherby & Gaffney to be used in the construction of the barracks. Conde was a surety upon the bond, and advanced moneys to enable Witherby & Gaffney to perform the contract so that he might not be held upon the bond.

In Ely vs. U. S., 19 Ct. Cls., 658, 664, it is held that where a vessel is lost in the service of the United States, the claims of the owners against the Government cannot be assigned by reason of Section 3,477.

In Johnson vs. U. S., 13 Ct. Cls., 217, 224, it is held that a claim for a threshing machine sold to an Indian agent cannot be enforced by the assignee by reason of Section 3,477.

In Forehand vs. U. S., 23 Ct. Cls., 477, 482, (1888), it was held that a claim for the use of an invention by the United States would be defeated, if prosecuted by the assignee, under the provisions of Section 3,477.

Attorney Gen. Devens, in 16 Op. Atty. Gen. U. S., 261, held that an irrevocable power of attorney to collect pay for dredging a river for the Government may be revoked by the contractor at will as void under Section 3,477. (See also opinion in Eads case, 16 Op. Atty. Gen., 153.)

In 16 Op. Atty Gen., 191, Attorney General Devens held that where an approved voucher for transportation in the navy department had been issued, assigned, and the assignment repudiated, such an assignment was void under Section 3,477, and

could be repudiated and payment made to the original contractors.

In Howes vs. U. S., 24 Ct. Cls., 170, it is decided that an attachment by a creditor of a claim against the United States in a proceeding in the nature of a creditor's bill, whereby the title of the particular claim is sought to be acquired under a State law, is ineffectual to work a transfer or devolution of such claim by reason of the provisions of Section 3,477.

In Harris vs. U. S., 27 Ct. Cls., 177 (1892), it is adjudged that an assignment of a voucher given to a blacksmith for work done on an Indian reservation, although made for a valuable consideration, is void under Section 3,477.

II.

**The assignment by Witherby and Gaffney to York and Starkweather was within the purview of the statute and illustrates both mischiefs which the statute was enactad to re medy.**

(1). The assignment to York & Starkweather raised a conflict at the time of payment, with Witherby & Gaffney, the original claimants, who in fact received the money from the Government, because the Quartermaster, relying upon the statute, refused to recognize the assignment (p. 23).

(2). The assignments to Conde and Streeter, two in writing and one oral, which have been the subject of litigation in the State Court, further illustrate the danger and inconvenience of the

Governments' recognizing any assignment (pp. 8, 9, 12, 13).

(3). By these various assignments the assignees became interested in pushing this claim, and it turns out that an act has actually been passed by Congress for the relief of Witherby & Gaffney, approved March, 1895, entitled an "Act "for the Relief of Witherby & Gaffney." Nothing is intended against the good faith of the defendants in error by this reference to an Act of Congress. It is only on illustration of what may be done under the stimulus afforded by the assignment of a part of a claim. The fact remains that no relief was granted against the amount in controversy in this action.

The ruling of the Court of Appeals on this point is: "In our opinion a just construction of the stat- "ute does not invalidate the contract of Witherby "& Gaffney to the plaintiffs, nor will the object of "the statute be defeated by the construction that "such a contract made in the legitimate and usual "course of business, in good faith, to secure an "honest debt, while it may be disregarded by the "Government, is good as between the parties, so "far as to enable the transferee, after the Govern- "ment has paid over the money to the claimant, "to enforce as against him or those who take with- "out notice, the interest or lien given by the assignment.

The principle here laid down would permit most of the mischiefs which the statute was designed to remedy. Under such a construction, the statute would be fully satisfied by the Government's pay-

ment to the original claimant who would be subject the instant he received it, to a suit in equity to enforce every lien and claim against the moneys in his hands which might have been created by him in defiance of the statute. He would be subject to a remedy by injunction to prevent him from disposing of them when they were received by him. He could be attacked in federal or state courts. Such a ruling would have enabled every assignee and lienor, who has hitherto been defeated by a judgment of the Court, to make the assignment as effectual as if the judgment had not been rendered. He had only to put the machinery of the law in motion the instant the funds were paid over, or as in this case, to pursue the funds in the hands of a third party. This would be a clear evasion of the statute.

III.

**Section 3477 may be invoked against prohibited assignments, by the original claimants or persons subsequently and lawfully acquiring an interest in payments from the Government. The privilege is not limited to the Government.**

Spofford v. Kirk, 97 U. S., 484.
Trist v. Child, 21 Wall, 441, 447.
McKee v. Cochrane, 17 Washington Law Reporter, 219 (Supreme Court Dist. Columbia 1889).
Woods v. Dickinson, 18 Washington Law Reporter, 5 (Dist. Columbia, 1889.)
Becker v. Sweetzer, 15 Minn , 427.
Newell v. West, 149 Mass., 520.

In Spofford vs. Kirk, 97 U. S., 484, an attorney was employed to collect a claim against the United

States for twelve thousand dollars for supplies furnished to the army during the war of the rebellion. While the claim was pending uncollected, the owner of it gave an order on his attorney, who was prosecuting it, to a third party, requesting the payment of a portion of it to the payee when it was collected. The attorney accepted the order. When the collection had been made and was in the hands of the attorney, the claimant repudiated the order, setting up Section 3,477 in avoidance of it. The accepted order had been transferred to a third party, who had bought it in good faith, and who then proceeded to assert his rights by a suit in equity against the attorney and the claimant. The Court followed the decision in U. S. vs. Gillis, Mr. Justice Strong writing the opinion.

This was a judgment between private parties, in an action to which the Government was not a party. It should be conclusive on this appeal unless overruled by later cases. It was decided by the Court below that it had been overruled by the following cases:

Goodman v. Niblack, 102 U. S., 556.
Hobbs v. McLean, 117 U. S., 567.
Freedman's Saving & Trust Co. v. Shepard, 127 U. S., 494.
Jernegan v. Osborne, 155 Mass., 207.

Goodman vs. Niblack: In this case a contractor, having a contract with the United States, agreed with another that the latter should perform it, and that there should be an equal division

of the profits. Both parties entered into an agreement with a trustee and assigned the contract to him for the due fulfillment of their bargain. Upon a dispute arising as to the amount due, Congress authorized the trustee, by special Act, to sue the United States therefor, and made an appropriation to pay the judgment which he recovered. The Court held in an opinion by Mr. Justice Miller, that the assignment having been recognized by the government, the parties to the agreement and those claiming under them, were precluded from setting up that the contract was not assignable. It was also decided that an assignment for the benefit of creditors stood on the same ground as an assignment in bankruptcy, and was not within the prohibition of Section 3,477.

This was only following Erwin vs. U. S., 97 U. S., 392, decided at the same term as Spofford vs. Kirk, in which the doctrine was laid down that the statute does not cover assignments in bankruptcy or insolvency or transfers to heirs or legatees, or by other involuntary devolution. (Butler vs. Goreley, 146 U. S., 303; Redfield vs U. S., 27 Ct. Clms., 393; McKay vs. U. S., 27 Ct. Clms., 422; Morgan vs. U. S., 4 Ct. Clms., 319, 331).

That part of the judgment in Goodman vs. Niblack, holding that the voluntary transfer to the trustee was valid, was based upon a special Act of Congress, recognizing the assignment, and by thus recognizing it, taking it out of the provisions of Section 3,477. (See also 47 N. J. Equity, 488,

Chap. 15, U. S. Statutes at Large, Vol. 22, p. 4; Jernegan vs. Osborne, 155 Mass., 207).

That it was not the intention of the Supreme Court to overrule Spofford vs. Kirk, or to intimate that a different judgment should have been rendered on the facts then appearing, is made clear by Judge Miller's opinion, 102 U. S., 559:

"It is understood that the Circuit Court sus-
"tained the demurrer under pressure of the strong
"language of the opinion in Spofford vs. Kirk. We
"do not think, however, that the circumstances of
"the present case bring it within the one then un-
"der consideration, or the principles there laid
"down. That was a case of the transfer or assign-
"ment of a part of a disputed claim, then in contro-
"versy, and it was clearly within all the mischiefs
"designed to be remedied by the statute. Those
"mischiefs, as laid down in that opinion, and in
"the others referred to, are mainly two:

"First—The danger that the rights of the Gov-
"ernment might be embarrassed by having to deal
"with several persons instead of one, and by the in-
"troduction of a party who was a stranger to the
"original transaction.

"Second—That by a transfer of such a claim
"against the Government to one or more persons
"not originally interested in it, the way might be
"conveniently opened to such improper influences
"in prosecuting the claim before the departments,
"the courts or the Congress, as desperate cases,
"when the reward is contingent on success, so
"often suggest.

"Both the considerations, as well as a careful
"examination of the statute, leave no doubt that
"its sole purpose was to protect the Government,
"and not the parties to the assignment. Erwin vs.
"United States (supra), decided at the same term
"as Spofford vs. Kirk, is suggestive on this point.

"It was there held that the claim of a bankrupt "against the United States passed by the assign- "ment in the bankruptcy proceeding to his as- "signee, and that the latter, and not the original "claimant, was the proper person to sue in the "Court of Claims. 'The passing of claims to heirs, "devisees, or assignees in bankruptcy is not within "'the evil at which the statute aimed,' said the "Court. The language of the statute, 'all trans- "fers and assignments of any claim upon the "United States, or any part thereof, or any interest "therein,' is broad enough (if such were the pur- "pose of Congress) to include transfers by opera- "tion of law, of by will. Yet we held it did not in- "clude a transfer by operation of law, or in bank- "ruptcy, and we said it did not include one by will. "The obvious reason of this is that there can be no "purpose in such cases to harass the Government "by multiplying the number of persons with whom "it has to deal, nor any danger of enlisting im- "proper influences in advocacy of the claim, and "that the exigencies of the party who held it justi- "fied and required the transfer that was made."

Hobbs vs. McLean, 117 U. S., 567: In this case three persons formed a partnership, agreeing to bear the loss and share the profits in proportion to their contribution to its capital. One of the persons, at the time of the formation of partnership, had made a bid for a contract to furnish supplies of wood and hay to troops in Montana, and the partnership was formed with the purpose of carrying out this contract when made. Afterwards the contract was awarded to the bidder, his co-partners performed it. In a suit by the co-partners for an accounting, the Court held that they were entitled to recover on the ground that entering into a co-partnership agreement to perform

services for the Government was not an assignment of a claim. That it was not the intention of the Court to overrule, Spofford vs. Kirk, appears from the opinion of the Court:

"It is obvious that Section 3,477, which forbids "assignments of claims against the United States "or any interest therein, unless under the circum- "stances therein stated, can have no reference to "such a contract as the partnership articles be- "tween Peck and the plaintiffs. When those ar- "ticles were signed there was no claim against the "United States to be transferred. Peck had at "that time no contract even, with the United "States, and there was no certainty that he would "have one. What is a claim against the United "States is well understood. It is a right to de- "mand money from the United States. Peck ac- "quired no claim in any sense until after he had "made and performed, wholly or in part, his con- "tract with the United States. * * * * * * "One or both of the sections of the statute which "we are now considering have been under the re- "view of this court in the following cases: United "States vs. Gillis, 95 U. S., 407; Erwin vs. United "States, 97 U. S., 392; Spofford vs. Kirk, 97 U. S., "484; Goodman vs. Niblack, 102 U. S., 556; Bailey "vs. United States, 109 U. S., 432; St. Paul & Du- "luth Railroad Co. vs. United States, 112 U. S., 733. "In none of them is any opinion expressed in con- "flict with the views we have announced in this "case.

"Our conclusion, therefore, is that the articles of "partnership were not forbidden by the letter or "policy of this statute."

Freedman's Saving & Trust Company vs. Shepherd, 127 U. S., 494: In this case the facts are complicated, and a sufficiently comprehensive statement of them cannot be profitably

included in these points. Reference must be had to the case. But a careful examination of the statement of facts and of the opinion shows that it was decided on the same ground as Bailey's case. The head note reads: "When the Govern-"ment, as lessee of real estate occupied by it, recog-"nizes through its proper officers, the transfer of "the property and an assignment of the lease, and "pays the rent, there is nothing in Section 3,477 "Rev. Stat. respecting transfers and assignments "of claims against the United States which invali-"dates that transaction for the benefit of a third "party."

That the Court did not intend to overrule Spofford vs. Kirk by this case sufficiently appears:

First—The rental of real property, leased to the Government, where nothing is done by the lessor, is not recognized as a claim against the United States within the provisions of Section 3,477. The Court says: "We are of opinion that whatever "may be the scope and effect of Section 3,737, it "does not embrace a lease of real estate to be used "for public purposes, under which the lessor is not "required to perform any service for the Govern-"ment, and has nothing to do in respect to the lease "except to receive from time to time the rent "agreed to be paid. * * * * * * * * * * "Undoubtedly the lease made by Bradley to the "United States created in his favor what, in some "sense, was a claim upon the United States for "each year's rent as it fell due, and if the statute "embraces a claim of such a character, there could "not have been any valid transfer or assignment "of it in advance of its allowance, which could "have been made the basis of a suit by the assignee "against the United States, or which would com-

"pel the Government to recognize the transfer or "assignment."

Second—The Court further says: "It is per- "haps also true that under some circumstances the "assignor, before the allowance of the claim and "the issuing of a warrant, may disregard such an "assignment altogether." The circumstances here referred to can be no other than such as existed in the cases of U. S. vs. Gillis and Spofford vs. Kirk, which the Court cites with approval, and against the soundness of which nothing is said.

Third—The opinion of the Court so far as based upon the supposition that such a claim for rent is a claim against the United States, within the provisions of Section 3,477, rests wholly upon the circumstance that an assignment of the claim had been made before payment by the Government, and payment made without objection in pursuance of its terms, citing Bailey's case.

Fourth—The Court may have intended to hold that when any assignment of a claim has been made, and the Government has assented to such assignment, the statute no longer controls, but any further assignment or agreement in relation to the claim will be enforced between the parties.

Fifth—The ruling upon this branch of the case is based wholly upon special circumstances and cannot be taken as overruling well established cases cited with approval in the opinions of the Court, as well as in many later cases.

Jernegan vs. Osborn, 155 Mass., 207: This case, cited by the Court below, belongs to the

class of which Bailey's case is the first. The assignment had been made and the moneys paid over by the Government before the assignment was questioned. Chief Justice Morton says: "The "Government has paid over the money without ob- "jection to the defendant Osborn, as agent and "managing owner of the Europa. * * * * "Without undertaking to say that an assignor "might not, under some circumstances before the "allowance of a claim, disregard his assignment,

"we think the plaintiff cannot be permitted to in "this case. * * * * * It is very doubtful "whether the claim that was presented by the "owners which finally was recognized and paid by "Congress, came within the provisions of Section "3,477." A better authority upon this point is Newell vs. West, 149 Mass., 520.

In Becker vs. Sweetzer, 15 Minn., 427, a contest between private parties over a claim for supplies furnished to the Indians, the provisions of Section 3,477 were held to apply.

The provisions of Section 3,477 were never before construed by the Court of New York State, but the construction contended for by the plaintiffs in error has been recognized in

Stanford v. Lockwood, 24 Hun, 291.
Bowery National Bk. v. Wilson, 122 N. Y., 478.
Billings v. O'Brien, 45 How. Pr., 392–402.

IV.

**Where an assignment has been made and payment made under it, it is then too late to invoke the statute. Assignments are to be treated as mere naked powers of attorney revocable at pleasure.**

Bailey v. U. S., 109 U. S., 432.
Lopez v. U. S., 24 Ct. Clms., 84.
Buffalo Bayou River R. R. Co. v. U. S., 10 Ct. Clms., 238, 247.
Belt v. U. S., 15 Ct. Clms., 92, 110.

In Bailey vs. U. S., 109 U. S., 432, it is held, in an opinion by Mr. Justice Harlan, that payment to an attorney in fact, who has been constituted such befor the allowance of a claim by Congress or a Department, is as good as between the Government and the claimant, where the power of attorney has not been revoked at the time payment is made, notwithstanding the provisions of Section 3,477, and the Acts of which it is the successor.

This decision puts upon the owner of a claim the duty or obligation of repudiating an assignment before payment is made by the Government in pursuance of it. He cannot allow payment to be made to his assignee, then assert the invalidity of the assignment and collect again. The force of this decision, and the purpose and scope of the statute are comprehensively stated in an opinion by Judge Nott, in Buffalo Bayou R. R. Co. vs. U. S., 16 Ct. Cls., 238, 247.

"The statute as construed by the Supreme Court "in Spofford vs. Kirk, 97 U. S., 484, undoubtedly "operated upon this instrument so as to render it "wholly void. Nevertheless while Courts of the

"United States cannot give effect to such powers "or assignments so long as they remain unexecut- "ed, they cannot ignore consummated transactions "under them, by either permitting the assignor to "recover from the assignee the money paid him, or "by compelling the Government, whose officers "have acted on the faith of such an instrument, to "pay the debt a second time. The purpose of the "statute was not to protect individuals, nor to "regulate the business transactions of private per- "sons, but to protect the Government. The pur- "pose is well expressed in the title of the Act of "1853, 'An Act to prevent frauds upon the Treas- "ury.'"

"Our meaning will perhaps be made clearer by "a familiar illustration. A Statute of Frauds will "declare certain agreements absolutely void, and "no court of the country will be at liberty to en- "force them. Nevertheless, if two persons volun- "tarily enter into such a contract, and voluntarily "carry it into effect, the one party cannot sue for "and recover back the money which he may have "paid, and the other cannot sue for and recover a "higher price for the goods which he may have "sold, and no Court will be at liberty to undo what "the parties have themselves voluntarily done. "This statute to prevent frauds upon the Treas- "ury is of a nature of a statute of frauds. It was "designed to absolve the Treasury from all com- "plicity in, or responsibility for the sale or assign- "ment of claims until they had reached the point "where, in the forms of drafts they would be "merged in negotiable evidences of debt, and when "the amount being ascertained and fixed, the as- "signment or power of attorney could describe the "chose assigned with the most accurate exactitude "and certainty. At the same time the statute did "not forbid the officers of the Treasury from recog- "nizing or acting upon the instrument declared "void, nor did it declare the sale or assignment of "claims to be champertous, or penal. In a word "it left these assignments and powers of attorney

"precisely where the Statute of Frauds left "the agreements, which it declares void, "as instruments which cannot be enforced at law, "but which, when voluntarily given by the Gov- "ernment creditors and voluntarily carried into "effect by the defendant's officers, must be deemed "by all Courts to have expressed and executed the "true intent of the parties."

In Lopez vs. U. S., 24 Ct. Cls., 84, there is a careful review of all the cases decided by the Supreme Court of the United States. Chief Judge Richardson, writing the opinion, says: "The practical "effect of the law, thus interpreted, is that such as- "signments and transfers, whatever be the consid- "eration, are mere naked powers of attorney, re- "vocable at pleasure. Creditors may avail them- "selves of such instruments in order to have money "due them from the United States, paid to such "persons and in such manner as they may direct, "in like manner as they may transact business "with individuals, provided there be no contro- "versy, and the accounting officers see no grounds "for suspicion of fraud or other satisfactory reason "for refusing to recognize the transfers. But the "Government cannot be involved in controversies "between private parties."

In Belt vs. U. S., 15 Ct. Cls., 92, 110 (1879), a case of assignment of a claim for supplies furnished to an Indian agent, the Court says: "Belt & Co. "therefore had an undoubted right at any time be- "fore actual payment to repudiate their assign- "ment to Stewart, and this they did, when in Feb- "ruary, 1866, they brought this action to recover "upon the same claims in their own names."

It is clear also from an examination of the decisions that this statute is in its nature a statute of frauds, and that when there has been a full per-

formance under a void assignment, no one will thereafter be permitted to demand another performance; but, if before payment has been made, the assignment is repudiated, it becomes inoperative. It is revocable at pleasure, and revocable between the parties as well as between the parties and the United States. It is illogical to hold that the statute renders an assignment void as against the United States and valid between private persons. Such a ruling would lead to the payment of a claim by the Government to an original claimant when as between him and his assignee he was a stranger to it, and had no interest in it. If void at all, the assignment must be void altogether. The exceptions arising from bankruptcy, insolvency and death, illustrate and strengthen the rule. In such cases the Government recognizes the necessity of acknowledging the title of the assignee; otherwise there would be no one to whom payment could be made. The payment is always made to the owner.

V.

**If prohibited by Statutes of the United States the assignment from Witherby & Gaffney gave no rights to the assignee under the laws of New York.**

Sections 1909 and 1910 Code Civil Pro.

Section 1909. When the transferee or claim or demand may sue. Rights of the defendant, etc. Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding or interpose as a de-

fence or counterclaim, in his own name, as the transferor might have done; subject to any defence or counterclaim, existing against the transferor, before notice of the transfer, or against the transferee. But this section does not apply where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred.

Section 1,901. What claims or demands may be transferred. Any claim or demand can be transferred, except in one of the following cases:

1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.

2. Where it is founded upon a grant, which is made void by a statute of the state; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute.

3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy.

VI.

**The United States Court has jurisdiction to review the judgment of the State Court in this case, involving a right or title dependent upon the construction of Section 3477 U. S R. S.**

To give jurisdiction it must affirmatively appear not only that a federal question was presented for decision, but that its decision was necessary to the

determination of the case, and that it was actually decided, or that the judgment rendered could not have been rendered without deciding it. California Power Works vs. Davis, 151 U. S., 389-393. Such a question is involved in the present case and is actually decided by the Court below (p. 5). The question passed upon was the validity of the transfer of the claim against the United States from Witherby & Gaffney to the defendants in error. The plaintiffs in error claim a title and right to the payment made by the United States under the transfer to them from the original claimants. This title has been defeated by the construction of Section 3,477 made below. The case is thus brought within the United States statute relating to the review of the decision of the State Court by the Supreme Court. (U. S. R. S. Sec. 709).

Butler vs. Goreley, 146 U. S., 303, resembles the case at bar. There the question was as to the ownership of a claim against the United States. The Supreme Court of Massachusetts held that a transfer of the claim was good, not being within the provisions of Section 3,477. The Supreme Court considered the writ of error and affirmed the State Court, no question being raised as to jurisdiction.

Where a plaintiff sued to recover a sum of money paid to his use by the United States, and also for moneys due him for work and labor, and the defense to the first count was that the assignment of the claim was void under Section 3,477, R. S. U. S., the Court of Appeals of Delaware refused

to disturb a verdict which did not specify under which count judgment was rendered. The case was taken to the Supreme Court, where the writ of error was dismissed on the ground that the only federal question in the case was not involved in the trial of the issue under the second count, and as the judgment could be sustained under the second count, the Supreme Court was without jurisdiction. (Delaware City & Navigation Co. vs. Reybold, 142 U. S., 636). Where the record showed that the plaintiff in error claimed in the State Court that the contract made with the defendant in error was void under the provisions of the Constitution of the United States, and certain Acts of Congress, and that the decision of the Supreme Court of Iowa denied the claim, a motion to dismiss the writ of error was denied. (Railroad vs. Richmond, 15 Wall, 3).

Where the provisions of the United States are invoked and the construction thereof involved, the Supreme Court has jurisdiction to review the decision of a State Court.

Matthew v. Zane, 4 Cranch, 382.
Ross v. Doe, ex dem, Borland, 1 Peters, 655, 664.
Buel v. Van Ness, 8 Wheat., 312, 317.
Rector v. Ashley, 6 Wall, 142, 147.
Carondelet v. St. Louis, 1 Black, 179, 188.
Lessieur v. Price, 12 How., 59, 73.
Aldrich v. Ætna Co., 8 Wall, 491.

Chief Justice Marshall says in Matthew vs. Zehn: "The third article of the Constitution, "when considered in connection with the statute, "will give it a more extensive construction than it

"might otherwise receive. It is supposed that the "Act intends to give this Court the power of ren- "dering uniform the construction of the laws of the "United States and the decisions upon rights or "titles claimed under those laws."

In Aldrich vs. Aetna Company, the question was whether a mortgage on a vessel to the defendant, duly recorded under an Act of Congress in the collector's office, gave a better lien than a subsequent attachment issued out of the Buffalo Superior Court in favor of the plaintiff. The construction of the Act of Congress was directly in question, and as the decision rendered was against the right claimed, the jurisdiction of the Supreme Court was sustained. In the case at bar, the construction of Section 3,477 was directly drawn in question, and the decision of the State Court was against the right which the plaintiffs in error claimed under the statute. The defendants in error claim that the assignment of Witherby & Gaffney to them is good, while the plaintiffs in error claim that it is void under the provisions of the statute. The statute is invoked by both parties, and under the cases cited, the Supreme Court has jurisdiction to review the judgment.

VII.

The judgment should be reversed.

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